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No. 92-255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PHILIPPINE GOODS, INC., TRANSAMERICA CORPORATION, and VICTORINO VILLACRUSIS,
Petitioners,

v.

CONCEPCION S. WABOL and ELIAS S. WABOL,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF InterPacific Resorts (Saipan) Corporation IN SUPPORT OF THE PETITIONERS

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MOTION OF INTERPACIFIC RESORTS (SAIPAN) CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

InterPacific Resorts (Saipan) Corporation (hereafter "PIC") respectfully moves for leave to file the attached brief *amicus curiae* in this case in support of petitioners, as provided in Rule 37 of the Rules of this Court. Attorneys for the petitioners have consented to this filing. The consent of the attorneys for the respondent was requested but refused.

PIC is a Saipan corporation and thus a United States citizen. However, PIC is barred from owning or acquiring

a "long-term" leasehold interest in real property in the Northern Mariana Islands ("NMI") because the directors and beneficial shareholders of PIC do not meet the ethnicity requirement of NMI Constitution Article XII, the constitutional validity of which is the central issue in the present appeal. Further, PIC is currently a defendant in a lawsuit which challenges the validity under Article XII of the lessor's title to a Saipan hotel property currently under lease to PIC.[1] PIC thus has a direct interest in the outcome of this appeal.

The accompanying *amicus* brief establishes that the decision of the court below is in conflict with longstanding precedents of this Court in four important respects not emphasized in the petitioners' brief. First, the brief accompanying this motion establishes that the right to equal protection of the laws (including and especially the right to be free of government-mandated racial discrimination in holding real property) is a "fundamental right" within the legal doctrine set forth in the Insular Cases. Careful examination of those cases and their progeny reveals that the constitutional provisions recognized in those cases as "non-fundamental," and therefore not necessarily applicable to the unincorporated territories, are exclusively procedural rights or institutional arrangements that lie uniquely within our American or English legal heritage, such as the right to jury trial. By contrast, this Court has uniformly recognized that basic substantive rights, such as the right to be free of government-mandated racial discrimination, apply with full force in the territories, possessions and commonwealths of the United States. The lower court ignored that key distinction and departed from this Court's precedents by exempting government-man-

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[1] *Cruz v. Terra Firma, Inc., et al.*, No. 92-825 (Super. Ct. Commw. N.M.I. filed July 15, 1992). This is one of the many cases cited in the accompanying brief in which the validity of ownership or leasehold interests has been challenged in the NMI, causing chaos in the land title system there.

dated racial discrimination in the territories from any equal protection scrutiny.

Second, the accompanying *amicus* brief shows that the court below erred in concluding that the constitutional rights at issue here are not fundamental "in the international sense." To the contrary, the accompanying brief demonstrates, as petitioners' brief does not, that the right to be free of government-mandated racial discrimination is universally recognized in the Constitutions of many nations and in international conventions.

Third, the accompanying *amicus* brief shows that the lower court improperly invoked and then misapplied the "impractical and anomalous" test set forth in Justice Harlan's concurring opinion in *Covert v. Reid*, 354 U.S. 1 (1957). In so doing, the lower court reached a result not contemplated by Justice Harlan's opinion and contrary to the other precedents of this Court.

Finally, the brief tendered with this motion expressly demonstrates, as the petitioners' brief does not, that the suspect classification challenged here would have failed the equal protection scrutiny required by the Fifth or Fourteenth Amendments and the precedents of this Court, had such scrutiny been conducted. *See, e.g., Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990). If accepted by the Court, the arguments set forth in the accompanying *amicus* brief would be grounds for granting certiorari to review the lower court's decision in this case.

For the foregoing reasons, PIC respectfully requests that this motion be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF InterPacific Resorts (Saipan) Corporation IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICUS CURIAE

InterPacific Resorts (Saipan) Corporation ("PIC") submits this brief as *amicus curiae* in support of petitioners. It is of vital importance to the future of constitutional rule in the territories that this Court preserve the principles that at least the "fundamental rights" embodied in the Constitution apply in a Commonwealth of the United States, and that the right to be free of invidious, government-mandated

racial discrimination is such a fundamental right. The Ninth Circuit's decision below repudiates these principles and should be reversed.

PIC is a Saipan corporation and thus a United States citizen. However, PIC is not a "person of Northern Mariana Islands descent" because it does not meet the ethnicity test of the Constitution of the Commonwealth of the Northern Mariana Islands ("NMI") ("Constitution") Article XII, Section 5, which requires that a majority of the board of directors be persons of NMI descent and that a majority of shares of the corporation be owned by persons of NMI descent. Because PIC fails this ethnicity test, PIC is barred under Article XII from owning or holding a "long-term" leasehold interest in real property in the Northern Mariana Islands.

PIC currently operates a hotel, which it leases, on the Island of Saipan in the Commonwealth of the Northern Mariana Islands. PIC is one of a number of targets of lawsuits brought by persons of NMI descent who are seeking to avoid otherwise valid property sales or renegotiate otherwise valid leases by using Article XII of the NMI Constitution to cast a cloud upon the title of the NMI seller or lessor of the subject property. These lawsuits typically allege that the lessor, or some prior owner or imputed owner in the chain of title, failed to qualify as a "person of Northern Mariana Islands descent" (despite appearances); or that such NMI person used funds furnished by a non-NMI person to acquire the property and thereby created an equitable fee interest ("resulting trust") in favor of a non-NMI person, thereby voiding *ab initio* the sale and transfer of title. In the lawsuit to which PIC is party, it is alleged that PIC's lessor does not hold valid title to the central parcel of land underlying PIC's hotel because a transferring party several steps up the chain of title was allegedly not an NMI person.[1]

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[1] *Cruz v. Terra Firma, Inc.* No. 92-825 (Super. Ct. Commw. N.M.I. filed July 15, 1992). *See also Ferreira v. Mafnas Borja*, No. 90-047 (S. Ct. Commw. N.M.I., Feb. 18, 1992) (order enforcing Article XII), *appeal*

Thus, NMI Constitution Article XII, as applied, has deprived PIC (and other U.S. citizens) of the right to own property in the Northern Marianas and has cast a cloud over the validity of its leasehold interest in a major Saipan hotel.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari filed by Philippine Goods, Inc., TransAmerica Corporation, and Victorino Villacrusis, should be granted because this case involves questions of exceptional importance. The Ninth Circuit's decision badly misinterprets and misapplies the precedents of this Court.

If allowed to stand, that decision will establish, in effect, that NMI and the Government of the United States may collaborate in mandating race or ethnic discrimination in property ownership in a commonwealth or territory of the United States without so much as an examination of whether

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docketed No. 92-15523 (9th Cir. March 18, 1992); *Aldan-Pierce v. Mafnas*, No. 89-003 (S. Ct. Commw. N.M.I. June 20, 1991) (order enforcing Art. XII), *appeal docketed*, No. 91-16240 (9th Cir. July 30, 1991) (voiding title under Article XII on a resulting trust theory despite the court's concern "that a decision (to do so) may unleash chaos in the Northern Mariana's land title system and economy."). These lawsuits indeed have caused havoc in the Northern Mariana's land title system and economy. Besides the present appeal and the two cases cited above which are also on appeal, at least nine civil actions raising Article XII challenges are currently pending in the Superior Court of the Commonwealth of the Northern Mariana Islands. *Olipai v. Hillblom*, No. 92-984 (filed Aug. 12, 1992); *Chong v. Tadohiro Kamoshito*, No. 91-264 (filed Mar. 28, 1991); *Mafnas v. Fennell*, No. 90-550 (filed June 10, 1990); *Cepeda v. Hefner*, No. 88-682 (filed Sept. 22, 1988); *Mafnas v. Loretta*, No. 88-696 (filed Sept. 28, 1988); *Iglesias v. Layne*, No. 88-704 (filed Sept. 22, 1988); *Reyes v. Millard*, No. 88-705 (filed Oct. 6, 1988); *Castro v. Layne*, No. 88-707 (filed Oct. 7, 1988); *Tudela v. Layne*, No. 88-715 (filed Oct. 14, 1988).

this denies U.S. citizens the equal protection of the laws.[2] Indeed, the lower court decision will help to establish an even more dangerous precedent: that political authorities may disregard basic constitutional rights of individuals in the territories whenever the political authorities deem it convenient or expedient to do so.

The court below acknowledges—and properly so—that "fundamental" constitutional rights apply in the territories of the United States. *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1990). It therefore is undisputed that fundamental substantive rights guaranteed by the United States Constitution apply to U.S. citizens residing in the Commonwealth of the NMI. Nonetheless, the court below inappropriately expands a doctrine developed around the turn of the century in the so-called "Insular Cases" that certain non-fundamental (usually procedural) arrangements deriving from Anglo-Saxon traditions—*e.g.*, the right to a trial by jury or in-

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[2] *Covenant to Establish a Commonwealth in Political Union with the United States of America*, § 805, *reprinted as amended in* 48 U.S.C.A. § 1681 note (West 1987) (hereafter, "Covenant") states in relevant part: "the Government of the Northern Mariana Islands . . . (a) *will* . . . restrict the acquisition of . . . [permanent and long-term interests in real] property to persons of Northern Mariana Islands descent" (emphasis supplied). Article XII of the NMI Constitution reiterates this prohibition and defines persons of "Northern Mariana Islands descent," in racial terms. Persons born before 1950 may obtain status as an NMI person on the basis of citizenship and place of birth or domicile. All persons born after 1950, however, are assigned their landholding status based exclusively on their ancestry. Neither the drafters of the Covenant nor the court below contest that this is a government-mandated racial or ethnic classification. *Joint Resolution to Approve the "Covenant to Establish A Commonwealth Of The Northern Mariana Islands In Political Union With The United States of America," And For Other Purposes: Hearings on H.J. Res. 549 Before the Subcomm. on General Legislation of the Senate Comm. on Armed Services*, 94th Cong., 1st Sess. 147-148 (1975); *Wabol v. Villacrusis*, 958 F.2d 1450, 1461 (9th Cir. 1990). Yet the Ninth Circuit found that equal protection analysis did not apply. *See Wabol*, 958 F.2d at 1462 n.22 ("The district court's conclusion that equal protection analysis was applicable was error.").

dictment by a grand jury—are not necessarily required in the U.S. territories.

This narrow exception set forth in the Insular Cases has no application to the basic, substantive rights at issue here. This Court has found that the right to be free from government-mandated racial discrimination in the ownership of property is a fundamental value incorporated in the Constitution's Equal Protection Guarantee. It is a value that has attained universal recognition transcending national borders. Under this Court's jurisprudence, it thus cannot be compromised in its application to U.S. citizens in the states or territories. In finding that this fundamental right does not apply to the Commonwealth of the NMI, the court below improperly invoked and then misapplied the "impractical and anomalous" standard. The result is a decision that would allow the Government simply to waive our most precious liberties, without constitutional scrutiny, in the name of passing political interests such as the ability to "acquire necessary military outposts." 958 F.2d at 1462. Under constitutional principles properly applied, such interests must be considered, if at all, only as a *part* of the required equal protection scrutiny, not in place of it.

Certiorari should be granted here because the Ninth Circuit's conclusion that equal protection guarantees do not apply in a Commonwealth of the United States is in conflict with the Insular Cases and *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976). Further, the Ninth Circuit departed from this Court's precedents by approving government-mandated racial discrimination in landholding, without evidence that such discrimination could survive *any* of the standards of heightened scrutiny mandated by this Court's decisions in situations involving suspect classifications. *See, e.g., Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990).

ARGUMENT

I. COVENANT § 805 AND ARTICLE XII OF THE NMI CONSTITUTION INFRINGE UPON FUNDAMENTAL RIGHTS APPLICABLE TO NMI.

A. The Right To Be Free Of Government-Mandated Discrimination Based On Race Or Ethnic Origin Is A Fundamental Right Protected By The Equal Protection Guarantee Of The Fifth Or Fourteenth Amendments.

Few, if any, constitutional rights have been deemed more central to our system of democratic values in this century than the right to be free of government-imposed invidious classifications based on race, ethnic origin or alienage, whether such discrimination is manifested in education, *Brown v. Board of Education*, 347 U.S. 483 (1954), *Bolling v. Sharpe*, 347 U.S. 497 (1954); in jury qualification, *Strauder v. West Virginia*, 100 U.S. 303 (1879); in marriage, *Loving v. Virginia*, 388 U.S. 1 (1967); in the right to engage in lawful business, *Examining Board of Engineers, Architects & Surveyers v. Flores de Otero*, 426 U.S. 572 (1976), *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), or in the acquisition, ownership, or disposal of property, *Shelley v. Kraemer*, 334 U.S. 1 (1948), *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). This right has been embodied in the Fifth and Fourteenth Amendments' universal guarantees of each individual's right to due process and the equal protection of the laws.[3]

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[3] While the Fourteenth Amendment explicitly guarantees all persons the equal protection of the laws against state encroachment, the Fifth Amendment due process clause has been held to contain an equal protection component which protects individuals against federal infringement. *See Examining Board*, 426 U.S. at 601 n.33. Here, Congress has imposed a race-based restriction which NMI has implemented, *see supra* at 18-19. Therefore, Article XII should be treated as a congressionally-mandated restriction.

While this Court has held, in the so-called "Insular Cases" and since, that only the "fundamental rights" embodied in the Constitution apply *ex proprio vigore* in the "unincorporated" territories of the United States, the basic right of each person to the equal protection of the laws invariably has been considered among the "fundamental rights" that the Constitution unconditionally guarantees. Thus, in the concurring opinion in *Downes v. Bidwell*, 182 U.S. 244 (1901), which set forth the doctrine of territorial incorporation later adopted by a unanimous Court in *Balzac v. Porto Rico*, 258 U.S. 298 (1922), Justice White agreed that Congress had the power to impose special duties on imports from Puerto Rico notwithstanding the constitutional provision that "all duties, imposts, and excises" be uniform. But he also acknowledged:

> there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion[;] . . . the right to personal liberty and individual property; . . . to due process of law and to an equal protection of the laws; . . . Of the latter class are the rights to . . . particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence . . .

182 U.S. at 282-283.

In *Balzac*, the same distinction between "fundamental" rights and peculiarly Anglo-Saxon procedures or institutions recurs. There, a unanimous Court held that a people "living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution [the jury trial] of Anglo-Saxon origin, and when." 258 U.S. at 310. But the Court also confirmed that "[t]he guar-

anties of certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law, had from the beginning full application in the Philippines and Porto Rico. . ." 258 U.S at 312-313.

Indeed, this Court has never deviated from the principle that fundamental rights—including the guarantee of equal protection and the right to own property—must be observed in our territories, commonwealths and possessions. In *Examining Board*, the Court held that a "statutory restriction [imposed by Puerto Rico] on the ability of aliens to engage in the otherwise lawful private practice of civil engineering" in Puerto Rico is an unconstitutional violation of the Equal Protection clause of the Fourteenth Amendment or the equal protection component of the Due Process guarantee of the Fifth Amendment. 426 U.S. at 599-601. Likewise, the Court held in *Calero-Toledo v. Pearson Yacht Leasing Co.*, that the right to own property in Puerto Rico or be deprived of it only with just compensation is a fundamental right of persons there. 416 U.S. 663 (1974).

In holding, without even applying equal protection analysis, that government-mandated racial discrimination in landholding may be permitted in NMI, the court below has misread and misapplied the Insular Cases and their progeny. The court's stated reasons for its holding do not withstand scrutiny.

First, the lower court reasoned that the right in question here was not the general right to equal protection of the laws but rather the narrower right of equal access to property in NMI. That line of argument is directly contradicted by the *Examining Board* decision, where this Court held that the Fourteenth Amendment's Equal Protection clause (or the equal protection component of the Fifth Amendment Due Process clause) applies in Puerto Rico. 426 U.S. at 599-601. Significantly, the *Examining Board* Court did not differentiate according to the activity protected from racial

discrimination—that is, it did not ask whether the particular activity at issue reflected a "fundamental right." Had the Court done so it surely would have found that the ability to practice civil engineering was not a "right" at all, much less a fundamental one protected by the U.S Constitution. Here, the lower court erred by focusing on the fundamentality of the activity (landholding) protected from discrimination, rather than the fundamentality of the basic right to freedom from discrimination.[4]

Even if one assumes, contrary to *Examining Board* and to sound equal protection analysis, that the relevant issue is whether the right of equal accēss to property is fundamental, the lower court's decision remains groundless. For the case law is clear that the right of equal access to property ownership is itself a fundamental right within our constitutional system. In *Balzac*, for example, this Court held that the constitutional guarantee that no person may be deprived of property without due process of law was "fundamental" and had "full application" in the Commonwealth dof Puerto Rico. 258 U.S. at 312-13. Likewise, in *Lynch*, this Court held that "[e]quality in the enjoyment of property rights was regarded by the framers of [the Fourteenth] Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." 405 U.S. at 544 (*quoting Shelley*, 334 U.S. at 10). *See also Buchanan v. Warley*, 245 U.S. 60, 74-79 (1917).[5] Clearly the right to the equal enjoyment

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[4] The lower court cited *Califano v. Torres*, 435 U.S. 1, 3 (1978), in support of its conclusion that the scope of the equal protection guarantee is limited when applied to Puerto Rico. *Wabol v. Villacrusis*, 958 F.2d 1450, 1460 n.19 (1990). But *Califano* stands for no such proposition. That case merely held that Congress may deny Supplemental Security Income to persons residing in Puerto Rico. No invidious classification relevant to equal protection analysis was at issue there.

[5] Indeed, 42 U.S.C. § 1982 (1988) provides, in language derived from Section 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was under consideration: "All citizens

of property rights is not an exception to the general right of the individual not to be denied equal protection of the laws based upon his or her race; *both* are fundamental rights fully applicable in NMI.

The lower court's attempted distinction between rights that are "fundamental [only] to the American scheme of justice," and rights that form "the basis of all free government," is at best irrelevant here. That distinction has been applied only to differentiate institutional arrangements or procedural rights of distinctly Anglo-Saxon origin, such as the right to indictment by grand jury, trial by petit jury, and unanimous verdict. *See, e.g., Ocampo v. United States*, 234 U.S. 91 (1914) (no "fundamental right" to indictments by grand jury in the Philippines); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (no "fundamental right" to unanimous verdict in criminal cases in Hawaii); *Dorr v. United States*, 195 U.S. 138 (1904) (jury trial). As seen, the substantive rights at issue here have always been treated as fundamental rights that form "the basis of all free government."

Even if one accepts the lower court's (erroneous) holding that the only "fundamental" rights that apply to the U.S. territories are those that are, in addition, "fundamental in the international sense," the Ninth Circuit decision still lacks foundation. For the right of citizens to be free of state-mandated racial discrimination in property holding, as in other matters, is fundamental not only in an Anglo-American regime, but in the "international sense" as well. The Ninth Circuit fails to explain why the right is not fundamental to free government since it is recognized as a basic right throughout the world. The right is enshrined in the Constitutions of the nations from Germany and Japan to

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of the United States shall have the same right, in every State *and Territory*, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property" (emphasis supplied).

Guinea-Bissau and Jamaica,[6] and uniformly supported in international covenants and conventions.[7]

In sum, by their own terms, the Insular Cases offer no

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[6] *See* The Basic Law of the Federal Republic of Germany, Art. 3 ("No one may be prejudiced or favoured [sic] because of his sex, his parentage, his race, his language . . ."); The Constitution of Japan, Ch. III Art. 14 ("All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, . . ."); Constitution of the Republic of Guinea-Bissau, Title II, Art. 23 ("All citizens are equal before the Law, have the same rights and are subjected to the same duties, without distinction of race, sex, social, intelectual [sic] and cultural level . . ."); Jamaica (Constitution) Order in Counsel 1962, Ch. III, Art. 13 ("Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour [sic], creed or sex . . . to each and all of the following, namely—(a) life, liberty, security of the person, the enjoyment of property and the protection of the law . . .").

[7] *See International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 4, Art. 1. § 2 ("All peoples may, for their own ends, freely dispose of their natural wealth and resources . . .") and Art. 2. § 2 ("The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour [sic], sex. language, . . .") (signed but not ratified by the United States); *International Convention on the Elimination of all Forms of Racial Discrimination*, 660 U.N.T.S. 212, Art. 5 ("States parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour [sic], or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . . (d) . . . (v) [t]he right to own property alone as well as in association with others; . . .") (signed but not ratified by the United States); *Universal Declaration of Human Rights*, Art. 7 ("All are equal before the law and are entitled without any discrimination to equal protection of the law.") (United States not a signatory). Moreover, the charter under which the United States assumed Trusteeship responsibility for the NMI stipulated that "the administering authority shall . . . protect the rights and fundamental freedoms of all elements of the population without discrimination . . . ." *United Nations Trusteeship for Former Japanese Mandated Islands*, 61 Stat. 3301, T.I.A.S. No. 1665, Art. 6 § 3. Amicus does not argue here that the foregoing covenants and conventions directly mandate the avoidance of Covenant § 805 and NMI Constitution Article XII. They merely establish that the right to equal protection of the laws is "fundamental" in the international sense.

justification for the constitutional infringement presented here, even in the context of a distinctly foreign culture. They certainly offer no excuse for laws abridging the most basic rights of U.S. citizens who have chosen, and received, Commonwealth status and political union with the United States.

If denial of the right to be free of government-mandated racial restrictions on property ownership is a fundamental guarantee of the U.S. Constitution, then Congress' effort to carve out an exception for NMI must be unavailing. Congress' exercise of its enumerated powers is always subject to constitutional restraint. *See United States v. Robel*, 389 U.S. 258, 264 (1967) (" '[e]ven the war power does not remove constitutional limitations safeguarding essential liberties.' "); *Reid v. Covert*, 354 U.S. 1, 16 (1957) ("no agreement with a foreign nation can confer power on the Congress, or an any other branch of Government, which is free from the restraints of the Constitution"); *Boos v. Barry*, 485 U.S. 312, 324 (1988) (same).

B. The Court Below Misapplied This Court's Precedents By Ratifying Government-Mandated Racial Or Ethnic Discrimination In NMI, Without Equal Protection Analysis, On Grounds That Allowing Equal Access To Land In NMI Would Be "Impractical And Anomalous."

As seen, the Insular Cases and their progeny (including and especially *Examining Board*) flatly contradict the lower court's holding that the right to equal protection of the laws is not a fundamental right applicable in the territories. Thus, the court below erred in failing to engage in any equal protection or due process analysis to reach its conclusion. Moreover, the Ninth Circuit's reliance on the "impractical and anomalous" standard in support of its holding was misguided; it offers no shelter for the court's decision.

The "impractical and anomalous" standard was derived from *Reid*, 354 U.S. at 1, albeit not from the Court's opinion

in that case. *Reid* confronted the issue whether a serviceman's wife, on a military base overseas, was constitutionally entitled to indictment by grand jury and a petit jury trial for the alleged murder of her husband. A four-member plurality of the Court held she was entitled to both. In reaching this result, the Court criticized the Insular Cases and suggested that full constitutional rights should apply to all U.S. citizens wherever located.[8] Thus, the opinion of the Court in *Reid* opposes the notion that equal protection guarantees for U.S. citizens may be dispensed with if they are "impractical and anomalous."

The court below extracted the "impractical and anomalous" standard—the centerpiece of its holding—from Justice Harlan's concurring opinion in *Reid*. But that concurrence merely underscores the error of the lower court's analysis here. In *Reid*, Justice Harlan merely observed that "there is no rigid rule that jury trial must *always* be provided in the trial of an American overseas, if the circumstances are such that trial by jury would be impractical and anomalous." 354 U.S. at 75. Thus, Harlan's "impractical and anomalous" standard plainly addresses only a procedural right and is offered as an explanation, not an expansion, of the doctrine of the Insular Cases.

Justice Harlan relied on *Balzac*, one of the later Insular Cases, as an authority for his "impractical and anomalous standard." In *Balzac*, this Court had observed that the result

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[8] 354 U.S. at 8-9 ("While it has been suggested [in the Insular Cases] that only those constitutional rights which are "fundamental" protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou Shalt Nots" which were explicitly fastened on the Federal Government by the Constitution and its Amendments.") *Id.* at 14 ("[t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.").

of applying a rigid jury requirement "no matter what the needs or capacities of the people . . . may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice." 258 U.S. at 309-10. The Court concluded that "a people like the Filipinos or the Porto Ricans, trained to a complete judicial system which knows no juries . . . should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin [jury trial], and when." *Id.* at 310. Therefore, jury trials might be waived in order to further the fundamental goals of a trial: fundamental fairness and the orderly administration of justice. But *Balzac* also underscored that the basic rights of life, liberty, property and due process "had from the beginning full application in the Philippines and Porto Rico." *Id.* at 313.

Justice Harlan, adopting the *Balzac* approach in *Reid*, argued that the application of a certain procedural rights (again, a jury trial) to Americans overseas, may depend, in part, on "the particular local setting, the practical necessities, and the possible alternatives." 354 U.S. at 75. This analysis reduced essentially to a consideration of what process was "due" under particular circumstances. *Id.* Indeed, the concurrences of both Justices Harlan and Frankfurter assumed what *Balzac* declared: that the "due process" right itself could not be set aside. *Id.* at 53, 75. Thus, the lower court's holding in this case—that a government-mandated denial of equal rights to own property may be ratified without any due process (or equal protection) scrutiny—finds no sanction in the concurrences in *Reid*, or in the Insular Cases.

Moreover, even assuming that the "impractical and anomalous" standard is applicable here, the lower court badly misapplied it. The lower court failed to examine, in any detail, "the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it." 354 U.S. at 75. The court below declined to probe the necessity of the challenged landholding restriction and examined no race-neutral alternatives (such as zoning or pre-

sale review of major real property transfers according to stated criteria).[9]

After offering, with minimal discussion, a host of (largely extraneous) interests ostensibly served by the landholding restriction, the Ninth Circuit acknowledged that an attack upon the "precision with which the restrictions operate to further these interests . . . would have substantial force." *Wabol*, 958 F.2d at 1461. But the court then cavalierly preempted the attack with an observation that "[a] restriction need not be precisely tailored to qualify for exemption from equal protection scrutiny." *Id.* at 1462. By misapplying the "impractical and anomalous" standard, the Ninth Circuit has created a fictive "exemption" from equal protection scrutiny that clearly contravenes the express holding of *Examining Board* and the Insular Cases.

II. COVENANT § 805 AND ARTICLE XII OF THE NMI CONSTITUTION CANNOT WITHSTAND CONSTITUTIONAL SCRUTINY APPLICABLE TO SUSPECT CLASSIFICATIONS UNDER THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT OR THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Inasmuch as the Constitution requires equal protection scrutiny of the race- or ethnic-based property restriction at issue here, the question arises whether the restriction can

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[9] The contrast with *King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975), which also applied the "impractical and anomalous" standard, is instructive. Faced with an appeal of the denial of an American citizen's "right" of jury trial in American Samoa, the District of Columbia Court of Appeals remanded the case to the district court for a full factual finding as to whether Samoan customs and traditions would render trial by jury there "impractical and anomalous." The criteria for applying that test were strictly related to the achievement of a fair and orderly trial. On remand, the district court found that Samoan society and its court system had developed to the point that jury trial was practical there. *King v. Andrus*, 452 F. Supp. 11 (D.D.C. 1977).

withstand such scrutiny. The record below offers no basis for an affirmative finding.

To begin, the restriction at issue here cannot fairly be characterized as "benign." It favors established property holders who are members of the racial majority of NMI citizens and who control the power structure there. It discriminates against a number of minority groups, including naturalized and resident alien workers from the Philippines and other East Asian countries and U.S. citizens from the mainland. The record reveals that the number of resident alien workers in NMI has grown tenfold in the last ten years. U.S. Department of Commerce, Bureau of the Census, 1990 Census of Population and Housing, Commonwealth of the Northern Marianas Islands (March 1992) at 16, 18. These various, largely Asian groups represent discrete and insular minorities "for whom . . . heightened judicial solicitude is appropriate." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 602 (1976), *quoting Graham v. Richardson*, 403 U.S. 365, 372 (1971). Not just investors, but small shopkeepers, farmers, renters, homeowners and tradesmen of non-NMI descent are the victims of the racially restrictive property holding measure. If not benign, the measure here at issue is plainly invalid on its face. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (O'Connor, J., concurring).

Even assuming the measure were to be considered "benign" discrimination mandated by Congress, the restriction is constitutionally permissible only to the extent that, at a minimum, it serves important governmental objectives within the power of Congress and is substantially related to the achievement of those objectives. *Metro Broadcasting v. F.C.C.*, 110 S. Ct. 2997 (1990).[10] While the protection of

[10] This is the most lenient standard of scrutiny articulated by this Court for examining a suspect classification. *Compare Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980) (requiring remedial purpose and measures "narrowly tailored" to achievement of that purpose). Yet Covenant § 805 and Article XII, as applied, fail to meet even the *Metro* test.

NMI persons from exploitation may well be an important government objective, Covenant § 805 and NMI Constitution Article XII are not reasonably necessary to, and do not substantially advance, that end.

First, the record is bereft of factual evidence that non-NMI persons are more likely to undertake exploitative or culturally- or family-damaging purchases of land than would persons of NMI descent, or that NMI persons are somehow culturally disabled from protecting their own interests in the absence of outside interference in their affairs. The measure aptly illustrates this Court's insight elsewhere that "[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *see also* Branch, "The Constitution of the Northern Mariana Islands: Does A Different Cultural Setting Justify Different Constitutional Standards?," 9 Am. J. Int'l L. & Pol. 35, 61 (1980) (predicting that within twenty-five years a majority of the land of any value would be held by a small minority of wealthy persons of "Northern Marianas descent").

Second, the restriction is badly under and over-inclusive, with respect to its ostensible purposes of "protecting local culture and values and preventing exploitation of inexperienced islanders . . ." *Wabol v. Villacrusis*, 958 F.2d 1450, 1461. It is under-inclusive because it allows persons of NMI descent to own property even if they live outside the NMI or apply the property to culturally alien uses, such as casinos. It is over-inclusive because it excludes from property ownership those persons who are living within NMI and within its cultural traditions, if such persons lack the requisite genealogy.

Third, the record reveals no effort by U.S. or NMI officials to explore reasonable, race-neutral alternatives to race-based restrictions.[11] Here, a requirement for administrative

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[11] Compare *Metro Broadcasting*, 110 S. Ct. at 2997, 3019 (racial clas-

review of all proposed sales or long-term leases of land above a certain size to test for fairness, full disclosure and cultural or environmental impact might well have served the stated goal more effectively than race-based prohibitions. Also, a zoning plan might have been used to guide the pace and character of development on the Islands. The record does not indicate that these race-neutral alternatives, or any other, were explored.

Fourth, the measure contains no provision for evaluating the necessity and effectiveness of the restriction imposed until at least twenty-five years from the date of enactment of the Covenant. If the race-based measure at issue here was not precisely tailored to begin with, it is certain that the imprecision will grow as 25 years pass without modification or review. *Metro Broadcasting*, 110 S. Ct. at 3024.

Fifth, the landholding restriction imposes impermissible burdens on *minority* residents within the NMI. Non-NMI persons are significantly disabled from (1) realizing the appreciation of equity investments in NMI, since all such investments are prohibited; (2) making long-term improvements in leased property with an assurance of adequate return; and (3) engaging in any occupation which may require the ownership or long-term lease of NMI land.

Sixth, there is little or no evidence on the record that invalidation of NMI's alienation restriction would impair the United States' ability to "form political alliances and acquire necessary military outposts" or "interfere with the performance of our obligations." 958 F.2d at 1462. According to a leading chronicler of the negotiations leading to the formation of the Commonwealth, the Marianas Political Status Commission ("MPSC"—representing the people of NMI), in a May 27, 1974 position paper, *questioned* the wisdom of making the land alienation restrictions mandatory. The

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sification adopted only after long study and painstaking consideration of all available alternatives).

MPSC preferred to leave the issue to the NMI people. *See* Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* at 592 (1989). United States negotiators insisted that the restrictions be mandatory, for at least for 25 years, otherwise U.S. assistance might be reduced. *Id.* NMI negotiators yielded to U.S. pressure, resulting in Covenant § 805. The record thus affords no reason to assume that consensual modification of Covenant § 805 and Article XII could not be obtained so as to conform the United States' international position to its constitutional obligation.

Finally, and most of all, the nature and experience of the NMI landholding restriction, as applied, offers little comfort that the restriction can or will accomplish its stated purpose of promoting the preservation of indigenous cultural and family traditions. For example, assuming Congress is legitimately concerned with assisting "traditional" landholding patterns in NMI (regardless of what individuals there want), it is by no means clear that allowing leases of forty (now fifty-five) years will accomplish that purpose more effectively than permitting the outright sale of the same property. The main impact of the NMI landholding restriction, in practice, may well be a simple "deadweight loss" in value and income to both NMI and non-NMI persons, as artificial market barriers and legal uncertainties drive risks up and land prices down.

Under these circumstances, it cannot be said as a matter of law that the landholding restrictions at issue here are necessary to or substantially advance an important government purpose.[12]

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[12] Simplistic analogies to land alienation restrictions upheld in cases arising under the "Indian legislation" are no substitute for the careful equal protection analysis required by the Constitution. The "Indian legislation," and cases arising thereunder, are inapposite because they did not impose alienation restrictions based on race or ethnic group. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-668 (1974).

CONCLUSION

For the foregoing reasons, and those expressed in the brief of the petitioners, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Under this legislation, treaties with, *e.g.*, the Creek, Quapaw and Pueblo Nations barred the sale of Native American land *to any person* without the approval of the Federal Government, at least for a period of time. *See, e.g., United States v. Noble*, 237 U.S. 74, 75 (1915) (Quapaw allotted land inalienable for twenty-five years after the date of the patents). The restrictions at issue in these cases were race-neutral as to the buyer. They applied to Native American sellers not on the basis of their race, but rather on the basis of the United States Government's residual or reversionary interest in land allotted to Native Americans, as well as a unique guardian-ward relationship that has long existed between the United States Government and those Native Americans who choose to live on federal reservations. Here, no such residual interest or guardian-ward relationship supports the Government's imposition of alienation restrictions on real property interests in the NMI. Nor does the Hawaiian Lands legislation offer a precedent since it has never been challenged.